FOR PUBLICATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al.,

Plaintiff(s)

-v-

No. 02 Civ. 7096 (LTS)(AJP)

SALTON, INC.,

Defendant(s).

LAURA TAYLOR SWAIN, United States District Judge

MEMORANDUM ORDER

This action arises out of alleged violations by Defendant Salton, Inc. ("Salton") of various federal and state antitrust laws, including section 3 of the Clayton Act, 15 U.S.C.A. § 14 (West 1997), in connection with Salton's distribution of George Foreman Grills (the "Grills") to retailers. Plaintiff States brought this action on their own behalf and as parens patriae on behalf of their natural-person residents under Section 4C(c) of the Clayton Act, 15 U.S.C.A. § 15c(a)(1) (West 1997). The parties entered into a Settlement Agreement prior to the September 6, 2002 filing of the original complaint. On January 13, 2003, the Court issued an order preliminarily approving the Settlement Agreement. Plaintiffs now move for final approval. The Court has subject matter jurisdiction of this matter pursuant to 28 U.S.C. §§ 1331, 1337, and 1367.

The Court has considered thoroughly all argument and submissions in connection with the instant motion. For the following reasons, Plaintiffs' motion is granted.

Plaintiffs contend that Salton 1) entered into price-fixing agreements with retailers, and suspended the supply of certain Grills to retailers who charged prices below the minimum set by Salton for those Grills, and 2) conditioned its sale of certain Grills on retailers' refusal to stock non-Salton contact grills. Plaintiffs allege that this conduct caused the prices of certain Grills to be maintained at artificial, non-competitive levels. In support of the instant motion, Plaintiffs have submitted the affidavit of Dr. Frank Lichtenberg, an expert economist. Dr. Lichtenberg estimates the overcharges paid by purchasers during the period from January 1998 to September 2002 to total approximately $33 million. (Lichtenberg Aff. ¶ 28.)

The Settlement Agreement requires Salton to make a structured payment of $8 million, less that portion attributable to non-participating States. The payments, and Plaintiffs' releases required to be delivered under the Settlement Agreement, are to be placed in escrow until Salton makes all the scheduled payments, the last of which is to be made by March 1, 2004. The settlement fund is then to be allocated pro rata among Plaintiffs, and to be distributed cy pres to non-profit or governmental entities. Each State is to prepare a plan of distribution, requiring approval of the Court, by March 10, 2004.

Under the Settlement Agreement, Salton also agreed to pay the entire cost of providing consumers notice of the settlement, and an additional $200,000 to cover Plaintiffs' attorneys' fees and costs.

The Settlement Agreement provides for injunctive relief as well. Under its terms, Salton has agreed to the entry of a Final Judgment and Consent Decree enjoining Salton from committing the practices described in the Complaint for five years, with certain exceptions, and including various other requirements, such as requiring Salton to grant Plaintiffs reasonable

access to documents related to the Judgment or Settlement Agreement and to hold mandatory antitrust law training for its sales staff.

In support of the instant motion, Plaintiff has also submitted the affidavit of Wayne L. Pines, the Executive Vice President of the consulting firm retained to effect the publication of the Notice of Settlement, in accordance with the Court's January 14th Order. On the basis of Mr. Pines' uncontroverted affidavit, the Court finds that the notice provisions of the January 13th Order have been satisfied.

The Clayton Act requires court approval of any parens patriae settlement agreement. See 15 U.S.C.A. § 15c(c) (West 1997). Although section 15c(c) does not specify the legal standard for approval, courts look generally to the standard applied in approving class action settlements under Federal Rule of Civil Procedure 23(e). See State of New York v. Keds Corporation, No. 93 Civ. 6708, 1994 WL 97201, *2 (S.D.N.Y. March 21, 1994). A settlement will be approved if it is fair, reasonable, and adequate. Id.

The fairness of a settlement concerns whether it resulted from "good faith, arms-length bargaining between experienced counsel." State of New York v. Nintendo of America, Inc., 775 F. Supp. 676, 680 (S.D.N.Y. 1991).

Plaintiffs here represent that the Settlement Agreement was executed only after approximately seven months of adversarial negotiation, which was preceded by a two-year investigation by Plaintiff States into Salton's alleged illegal conduct. Counsel for Plaintiffs include the Offices of the Attorneys General for all but three States; those Offices have extensive experience in bringing complex antitrust cases under their parens patriae powers. See Nintendo, 775 F. Supp. at 680 (recognizing experience of Attorneys General). Counsel for Salton,

Sonnenschein, Nath & Rosenthal, also has experience in antitrust litigation. Indeed, principal counsel for Salton, Alan H. Silberman, is a former Chair of the Antitrust Section of the American Bar Association, with 35 years of antitrust experience. The Court therefore finds that the Settlement Agreement is fair. Cf. Keds, 1994 WL 97201, at *2 (finding settlements fair where negotiations between experienced counsel "were intense and extended over five months").

To determine whether a settlement is reasonable and adequate, a court must weigh the compensation offered to the plaintiffs against the following factors:

> (1) the relative strength of the plaintiffs' case on the merits; (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial; (3) the anticipated duration and expense of additional litigation; (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement.

Id.

Although no grounds for doubting the solvency of Salton have been raised, all of the other factors as present in this case weigh in favor of approval. Litigation of this matter would be lengthy and complex, requiring extensive discovery of nationwide scope, as other courts have recognized in similar cases. See State of New York v. Reebok International Ltd., 903 F. Supp. 532, 536 (S.D.N.Y. 1995) ("case . . . would drag on for years as the parties conducted discovery throughout the country"); Keds, 1994 WL 97201, at *3 ("hydra-headed litigation would be complex and costly").

Salton vigorously denies Plaintiffs' merits allegations, asserting that its pricing and dealing policies constituted unilateral, and thus lawful, conduct, under the Supreme Court's decisions in United States v. Colgate & Co., 250 U.S. 300 (1919), and Monsanto Co. v. Spray-Rite Serv. Corporation, 465 U.S. 752 (1984). Under Monsanto, Plaintiffs would be required to

present "direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." Monsanto, 465 U.S. at 768. Plaintiffs would have to prove the existence of "illicit agreements on a state-by-state and retailer-by-retailer basis," Keds, 1994 WL 97201, at *3, a difficult burden to meet.

Even if Plaintiffs could prove the existence of unlawful agreements between Salton and its retailers, they would still have to prove that consumers were overcharged as a result of the scheme. Plaintiffs' own expert indicated the difficulty of such a task, because data on the wholesale and retail prices during the period prior to the implementation of Salton's pricing policy at issue are unavailable. See Lichtenberg Aff. ¶¶ 13-14. Salton would be entitled to offer evidence of alternative reasons for the relevant retail prices, reasons that, in the opinion of Salton's expert economist, render highly unlikely any attempt to establish that retail prices would have dropped in the absence of Salton's pricing policy. See Declaration of Dr. Sumanth Addanki ("Addanki Decl."), attached to Def.'s Mem. in Support of Prelim. Approval.

The lack of opposition to the settlement also weighs in favor of its approval. Only 12 class members, out of a potential class of millions, opted out of the Settlement, and only 6 filed formal objections. See Exs. D, E to Weinstein Decl. Those objections related to the cy pres method of distribution, with the exception of an objection to the action itself, and they do not lead the Court to conclude that the Settlement is not fair, reasonable, and adequate. See Reebok Int'l Ltd., 903 F. Supp. at 537 (characterizing as "miniscule" opposition to settlement consisting of 209 class members informally objecting and 13 formally objecting, and finding that objections did not constitute grounds to deny approval).